Public Prosecutor v Chong Boon Sim

HIGH COURT (KUCHING) — CRIMINAL NO 45–13 OF 2010-I
SANGAU GUNTING J
14 MAY 2012

Criminal Law — Kidnapping Act 1961 — s 3 — Kidnapping — Essential ingredients of offence — Whether prosecution had established prima facie case — Whether defence had cast reasonable doubt upon prosecution case — Sentence — Public interest

Criminal Procedure — Charge — Defective charge — Whether challenge on charge ill-founded — Whether defect had occasioned failure of justice

While Chong Chun Ming ('the victim') was assisting his father in running the Ming Ming Food Court ('the food court') situated at Bau town, Sarawak, he received a telephone call from the accused. The accused had allegedly informed the victim that he wanted to meet the victim and pay the rental he owed in respect of one of the food stalls that he rented at the food court. When the victim and his co-worker arrived at Tasik Biru to meet the accused and collect the rental, there were three persons present, namely the accused and two others. Both the accused and one other had pulled out knives, which they threatened to use to stab the victim if he did not get into their car. The victim and the co-worker were then taken from Tasik Biru to an empty house. After removing the victim and the co-worker's valuables and handphones the alleged kidnappers had proceeded to blindfold them and tie them up. The alleged kidnappers had then telephoned the victim's mother and asked the victim to talk to her and his father by holding the handphone to his ear. The victim's parents claimed that the alleged kidnappers had demanded a ransom sum of RM200,000. After the kidnappers had left the house the victim and the co-worker helped each other to untie the knots binding them. After freeing themselves from the knots and blindfolds the two ran out of the empty house and made their way to a house on the opposite side of the river. From there the victim managed to contact his father and tell him he was safe. Upon learning that his son had escaped, the victim's father called the police to ask for their assistance in learning the identity and location of the alleged kidnappers. However, the victim's father's plan to give the 'ransom' money so as to apprehend the alleged kidnappers was aborted as the latter knew of the presence of the police personnel. Based on the evidence provided by the victim of the accused, as one of his kidnappers, the latter was arrested. The accused together with the two others, who were still at large, was charged with the

offence of wrongfully restraining the victim in furtherance of their common intention of restraining him with intent to hold ransom. At the close of the prosecution case, the court found that a prima facie case had been established and called upon the accused to enter his defence. In his defence the accused claimed that he was completely ignorant of the kidnapping scheme, if any, devised by the two others. In his lengthy unsigned defence submission the accused claimed that he was under the impression that the whole incident alleged by the prosecution to be a kidnapping was merely a debt collection exercise initiated by one Boon Jang Lung ('Boon'). The accused further submitted that the charge was defective in that it failed to include one other person who had been arrested together with the accused, who had been subsequently released on the direction of the DPP.

Held, convicting and sentencing the accused with the offence charged:

(1) A close scrutiny of the accused's line of defence neither disclosed anything substantial nor raised any reasonable doubt in the prosecution's case as substantially portrayed by the testimonies of the main prosecution witnesses, namely the victim and the co-worker. Although the accused claimed that the whole incident alleged by the prosecution to be kidnapping was initiated by Boon and he was wholly unaware of any part of Boon's plan, his testimony did not support such a defence. In fact, the accused's testimony clearly indicated the actual occurrence of some vital aspects of the prosecution case as elicited through the victim and the co-worker (see para 72).

(2) Further the matter of the victim's younger brother owing one of the alleged kidnappers RM20,000 and the accused's defence associated with alleged debt collection was an afterthought that could not be considered. This defence was completely contradictory to the actions of the accused in convincing the victim to come to Tasik Biru, preventing the victim from escaping when he sensed he was in danger and tying up and abandoning both the victim and his co-worker in the empty house (see paras 73–74).

(3) The accused's submission as to the defect in the charge ought to have been raised at the commencement of the trial or very soon thereafter. In any case the objection raised by the accused had not precisely shown the nature of the alleged defect and of how it had occasioned a failure of justice as contemplated by s 422 of the CPC. Further the accused's contention in this regard would appear thoroughly meritless considering the public prosecutor's wide discretion in issues of inter alia whether or not to prefer a charge against a potential defendant (see para 79).

(4) Having regards to the evidence both direct and circumstantial adduced by both the prosecution and the defence, the defence submission that the

prosecution had failed to prove common intention pursuant to s 34 of the Penal Code was without merit (see para 80).

(5) In considering the sentence to be imposed the paramount consideration ought to be public interest. Hence the imposition of the six strokes of whipping in addition to the sentence of life imprisonment (see para 81).

[Bahasa Malaysia summary

Ketika Chong Chun Ming ('mangsa') sedang membantu bapanya mengendalikan Ming Ming Food Court ('Food Court tersebut ') yang terletak di pekan Bau, Sarawak, dia telah menerima satu panggilan telefon daripada tertuduh. Tertuduh dikatakan telah memberitahu mangsa bahawa dia ingin bertemu dengan mangsa dan membayar sewa yang dihutangnya bagi salah satu gerai makan yang disewanya di Food Court tersebut. Apabila mangsa dan rakan sekerjanya tiba di Tasik Biru untuk bertemu dengan tertuduh dan mengutip sewa, terdapat tiga orang yang hadir bersama, iaitu tertuduh dan dua yang lain. Kedua-dua tertuduh dan seorang lagi telah menarik keluar pisau, yang mana mereka gunakan untuk mengugut akan menikam mangsa jika dia tidak masuk ke dalam kereta mereka. Mangsa dan rakan sekerjanya kemudian dibawa dari Tasik Biru ke sebuah rumah kosong. Selepas mengambil barang-barang berharga dan telefon bimbit milik mangsa dan rakan sekerjanya, penculik-penculik tersebut terus menutup mata mereka dan mengikat mereka. Penculik-penculik tersebut kemudiannya menelefon ibu mangsa dan meminta mangsa untuk bercakap dengan ibu dan bapanya dengan memegang telefon bimbit ke telinganya. Ibu bapa mangsa mendakwa bahawa penculik-penculik tersebut meminta wang tebusan sebanyak RM200,000. Selepas penculik-penculik tersebut meninggalkan rumah berkenaan, mangsa dan rakan sekerjanya membantu satu sama lain untuk menguraikan simpulan yang mengikat mereka. Selepas membebaskan diri mereka daripada simpulan dan penutup mata, mereka berdua berlari keluar dari rumah kosong tersebut dan menuju ke sebuah rumah di seberang sungai. Dari sana, mangsa berjaya menghubungi bapanya dan memaklumkannya bahawa dia selamat. Apabila mendapat tahu bahawa anaknya telah melarikan diri, bapa mangsa menghubungi pihak polis untuk meminta bantuan mereka dalam mengetahui identiti dan lokasi penculik-penculik tersebut. Walau bagaimanapun, perancangan bapa mangsa untuk memberikan wang 'tebusan' untuk menangkap penculik-penculik tersebut dihentikan apabila penculik-penculik tersebut mengetahui kehadiran anggota polis. Berdasarkan keterangan yang diberikan oleh mangsa tertuduh, iaitu salah seorang daripada penculiknya, tertuduh telah ditangkap. Tertuduh bersama-sama dengan dua yang lain, yang masih bebas, didakwa dengan kesalahan menahan mangsa secara salah dalam melaksanakan niat bersama mereka menahannya dengan niat sebagai tebusan. Pada penutup kes pendakwaan, mahkamah mendapati kes prima facie telah dibuktikan dan memanggil tertuduh untuk membela diri. Dalam pembelaannya, tertuduh mendakwa bahawa dia benar-benar tidak mengetahui

A mengenai perancangan penculikan, jika ada, yang dibuat oleh dua yang lain. Dalam hujahan pembelaannya yang panjang lebar dan tidak bertandatangan, tertuduh mendakwa bahawa dia adalah di bawah tanggapan bahawa keseluruhan kejadian yang didakwa oleh pihak pendakwaan sebagai suatu penculikan adalah semata-mata langkah mengutip hutang yang dimulakan B oleh seorang yang bernama Boon Jang Lung ('Boon'). Tertuduh selanjutnya menghujahkan bahawa pertuduhan tersebut adalah cacat kerana ia gagal memasukkan seorang lagi yang lain yang telah ditangkap bersama-sama dengan tertuduh, yang kemudiannya dibebaskan atas arahan timbalan C pendakwa raya.

Diputuskan, menyabitkan dan menjatuhkan hukuman ke atas tertuduh atas kesalahan yang didakwa:

D (1) Suatu penelitian rapi ke atas pembelaan tertuduh tidak menyatakan apa-apa yang substantial mahupun membangkitkan sebarang keraguan munasabah dalam kes pendakwaan seperti yang digambarkan dengan ketara berdasarkan keterangan saksi-saksi utama pendakwaan, iaitu mangsa dan rakan sekerjanya. Walaupun tertuduh mendakwa bahawa E keseluruhan insiden yang didakwa oleh pihak pendakwaan sebagai penculikan telah dimulakan oleh Boon dan dia langsung tidak mengetahui apa-apa mengenai pelan Boon, keterangannya tidak menyokong pembelaan sedemikian. Malahan, keterangan tertuduh jelas menunjukkan kejadian sebenar beberapa aspek penting dalam kes F pendakwaan seperti yang didapati daripada mangsa dan rakan sekerjanya (lihat perenggan 72).

(2) Selanjutnya, hal perkara bahawa adik lelaki mangsa yang berhutang dengan salah seorang daripada penculik sebanyak RM20,000 dan G pembelaan tertuduh yang berkaitan dengan kutipan hutang merupakan suatu fikir semula yang tidak boleh dipertimbangkan. Pembelaan ini sama sekali bercanggah dengan tindakan tertuduh dalam meyakinkan mangsa untuk datang ke Tasik Biru, menghalang mangsa daripada melarikan diri apabila dia merasakan dia berada dalam bahaya dan H mengikat dan meninggalkan kedua-dua mangsa dan rakan sekerjanya di rumah kosong (lihat perenggan 73–74).

(3) Hujahan tertuduh mengenai kecacatan dalam pertuduhan seharusnya dibangkitkan pada permulaan perbicaraan atau tidak lama selepas itu. I Dalam apa jua keadaan, bantahan yang dibangkitkan oleh tertuduh tidak menunjukkan sifat kecacatan tersebut secara tepat dan bagaimana ia menyebabkan kegagalan keadilan sebagaimana yang ditetapkan oleh s 422 Kanun Tatacara Jenayah. Seterusnya, hujahan tertuduh dalam hal ini akan kelihatan tidak bermerit memandangkan budi bicara pendakwa

raya yang luas dalam isu-isu, antara lain, sama ada atau tidak untuk mendakwa pertuduhan terhadap defendan yang berpotensi (lihat perenggan 79).

(4) Setelah mempertimbangkan mengenai keterangan langsung dan keterangan hal keadaan yang dikemukakan oleh kedua-dua pihak pendakwaan dan pembelaan, hujahan pembelaan bahawa pihak pendakwaan telah gagal membuktikan niat bersama di bawah s 34 Kanun Keseksaan adalah tidak bermerit (lihat perenggan 80).

(5) Dalam mempertimbangkan hukuman yang akan dijatuhkan, pertimbangan utama seharusnya adalah kepentingan awam. Oleh itu, hukuman yang dijatuhkan adalah enam kali sebatan sebagai tambahan kepada hukuman penjara seumur hidup (lihat perenggan 81).]

Notes

For a case on s 3, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 1039.
For cases on defective charge, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1245–1284.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (refd)
Balachandran v PP [2005] 2 MLJ 301, FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)

Legislation referred to

Criminal Procedure Code ss 180, 422
Kidnapping Act 1961 s3
Penal Code s 34

Stella Augustine Druce (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Ateng Jeros (Ateng Jeros & Co Advocates) for the accused.

Sangau Gunting J:

THE CHARGE

[1] The charge against the accused is stated as follows:

Bahawa kamu bersama-sama dengan 2 orang yang masih bebas pada 7.02.2010 jam lebih kurang 5:30 petang, bertempat di sebuah rumah kosong, Jalan Depaoh Off jalan Sungai Pinang, Bau, dalam Daerah Bau, dalam Negeri Sarawak, bagi mencapai

matlamat bersama, dengan maksud menahan Chong Chun Min (L) (KPT:770604-13-6517) untuk wang tebusan berjumlah RM200,000.00 (Ringgit Malaysia Dua Ratus Ribu). Maka dengan itu, kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 3 Akta Culik 1961 dan dibaca bersama Seksyen 34 Kanun Keseksaan.

THE BURDEN AND STANDARD OF PROOF

[2] It would appear correct the learned Deputy Public Prosecutors (DPP's) exposition of the main ingredients of the offence which the prosecution is expected to be prove in order to establish a prima facie case against the accused (s 180 of the Criminal Procedure Code). A party is said to have succeeded in establishing a prima facie case if 'after conducting a maximum evaluation of the evidence, (the court) comes to a conclusion that it must call for the defence', whereby, if the accused elects to remain silent, the court must convict him' (*Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, per Gopal Sri Ram, JCA, as he then was).

INGREDIENTS OF THE OFFENCE

[3] Presumably based on the wording of ss 3 and 34 of respectively the Kidnapping Act 1961 (Revised 1989) ('Act 365'), and the Penal Code, the prosecution came up with three main ingredients which must be proved to establish a prima facie case, otherwise the accused would, at the end of the prosecution case, have to be acquitted and discharged without the necessity to call upon him to enter his defence. Those ingredients are:

(a) that the accused and two others who are still at large had wrongfully restrained a person;

(b) that the accused and two others who are still at large had wrongfully restrained a person with intent to hold ransom; and

(c) that the accused and two others still at large had in furtherance of a common intention had (sic) wrongfully restrained a person with intent to hold ransom.

[4] A closer look at the said three main ingredients would indicate, that the third ingredient contains all the previous two ingredients and therefore precisely resemble them, except that the third ingredient also contains the element of 'in furtherance of a common intention' vis a vis the element of the alleged '(wrongful restraint) of a person with intent to hold ransom'. Quite clearly, 'in furtherance of a common intention' was inserted to reflect that portion of the charge which alleges that the accused and two others still at large had allegedly committed the substance of the offence specified by the first two ingredients in furtherance of a common intention.

THE EVIDENCE ADDUCED DURING THE PROSECUTION STAGE

[5] One, Chong Chun Ming ('PW7', also the alleged victim) assisted his father in running Ming Ming Food Court at Bau Town. The accused Chong Boon Sim rented presumably one of the stalls therein. On 7 February 2010 at about 3pm PW7 received a telephone call from a 'friend' of the accused telling PW7 to collect rental owed by the accused in respect of a Ming Ming Food Court stall. PW7 testified in cross-examination that actually the accused also called him. PW7 was told to meet the accused and his friends at Tasik Biru, Bau. Initially PW7 told the caller he was not free, but the caller called repeatedly asking him to go and collect the rental, 'otherwise they would go back to Kuching'. It was around 5pm that PW7 relented and asked one of his workers, Bong Li Li ('PW8') to accompany him.

[6] PW7 testified upon reaching Tasik Biru, there were three persons waiting for him, but he could recognise only the accused, Chong Boon Sim. The three persons approached him as he was standing near the door of the car, used by PW7 and which belonged to PW6 (PW7's father). One of the three went presumably to the door of the front passenger seat, and prevented Bong Li Li ('PW8') from coming out of the car. One of the other two persons had with him an envelope and PW7 thought the person wanted him to pay the rental, but instead, the person took out a knife from the envelope and wanted to stab him. When PW7 tried to grab the hand of that person, 'the accused came over and took out his knife and also wanted to stab me'. In cross-examination PW7 testified the man who took out a knife from the envelope had tattoos on his body, and the accused took out a knife from his trouser pocket. Further cross-examined PW7 testified, he did struggle with them, asking, 'Why do you want to stab me?', and allegedly the accused and the tattoo man answered: 'You just get into car and we will not harm you'.

[7] After PW7 was pushed into the car and the car had started to move, according to PW7 the man who prevented PW8 from getting out of the car called 'the tawkey informing him, 'We have caught the person and we are on the way'. According to PW7, initially the man with the tattoo drove the car, but later the accused took over as 'the driver with the tattoo did not know the way'. It would be noted that going by the accused's description of the three persons involved, the one initially driving the car after PW7 was pushed into the rear portion of the car was Ah Boy, and the two in the back seats together with PW7 were Ah Fatt and the accused. During cross-examination, PW7 he described the other two persons together with the accused as Ah Ti and Ah Boy. According to him, Ah Ti was the one who prevented PW8 from coming out of the car, and Ah Boy was the one with the tattoo. It would seem then, that merely from the accused and PW7's respective description of each of the two persons who were together with the accused from the time the five of them

(including PW7 and PW8) left Tasik Biru to the time they reached the empty house, Ah Boy and Ah Fatt correspond to Ah Boy and Ah Ti respectively.

[8] Cross-examined, PW7 testified Ah Boy that while himself and PW8 were being tied up and blindfolded, Ah Boy took away his gold chain, watch, gold ring, and handphone, and that another person, took away PW8's gold necklace and handphone. In cross-examination he described these two persons as Ah Boy and Ah Ti. Further cross-examined, while at the empty house, Ah Boy passed the handphone to PW7 and he then talked to his mother. At that time his mother asked him where he was but PW7 did not dare to tell her 'because (Chong Boon Sim) near to my waist … I told my mother to give to the kidnappers whatever they asked for'. In examination-in-chief PW7 testified, although blindfolded he could still see through the piece of cloth used to blindfold him, and that although his hands were tied together at his back presumably by the tying of his fingers with cable tights, he could talk to his mother and father as '(the man with the tatoo) held the handphone and put (it) near to my mouth … and asked me to talk to my mother and then to my father'. Examined further, PW7 told the court the man with the tattoo 'held the handphone to my mouth first and then to my ear'.

[9] While talking to his father PW7 told him '… just pass the money to them'. According to PW7 after that they, presumably the alleged kidnappers, went out of the empty house 'to talk with my father over the phone'. Shortly thereafter they returned to the empty house 'and asked me whether my father will pass the money to them by tomorrow or not'. Examined what was his response, PW7 replied, 'I asked them how much money they asked from my father. (The one with the tattoo) said they asked RM200,000 from my father'.

[10] Examined further PW7 testified, 'The one with the tattoo informed me that, 'It is best your father pass the money to us by 8am the next day or otherwise we will kill you". He further told the court: 'The one with the tattoo informed me that they won't harm me if the money was given to them and that I have to make sure that the 3 of them are safe and nothing happens to them and they even informed me if one of them were arrested by the police and they know that our family are doing business, they might burn down our food court and also the supermarket'. PW7 told the court at that time he felt very scared. Meanwhile, PW8 kept quiet.

[11] Later, a car came to the place where presumably the empty house was located, and according to PW7 he could hear people coming out from the car by the sound of car door opening and closing, where upon the three of them — the accused, the man with the tattoo and the man who prevented PW8 from getting out of the car, asked the person coming out of the car 'whether this is the

correct person they wanted'. PW7, however, did not know whether the person coming out of the car answered or not.

[12] After that PW7 could hear the car leaving the place, and according to PW7 the three alleged kidnappers presumably, the accused, Ah Ti (or according to the accused presumably Ah Fatt) and Ah Boy, came into the empty house, and using safety belts (exh P9) they tied PW7 and PW8. Meanwhile Ah Ti was told to stand guard at the scene. After that PW7 heard the sound of a car leaving which he presumed to be his car as 'the first car left already …' PW7 and PW8 then listened to see whether or not, other than themselves, there was anybody around. Both of them being sure nobody was around, PW7 and PW8 then 'helped each other to untie the knot because both of us were sitting back to back to each other' ie untying the knots on their fingers, the safety belts and the cable tights which tied up their toes. PW7 testified presumably both he and PW8 'moved around' thereby managing to loosen the knots of the safety belts, and after untying the cable tights thereby presumably freeing their hands, they removed their blindfold. After freeing themselves from the knots and blindfolds, and after getting hold of a piece of wood, they ran out of the empty house.

[13] According to PW7, after 'walking for about 2–3 hours along the river bank', they finally saw a house at the opposite side of the river. They then screamed for help and a man emerged from the house. PW7 shouted and told the man his identity. The man then paddled his sampan across the river and brought PW7 and PW8 to his house. The man whose name PW7 did not know, turned out to be one who 'used to come to my supermarket to buy foodstuff'. Having been told by PW7 that he and PW8 were being kidnapped, the man then telephoned the Siniawan Police Station. PW7 then called his father and the latter later came to fetch PW7 and PW8 at a place next to the house of the man who helped them. PW7's father ('PW6') then brought PW7 and PW8 to Ming Ming Food Court.

[14] Tan Kim Hua ('PW5') testified on 7 February 2010 she received a call informing her the caller had kidnapped her son. She told the caller she wanted to listen to her son's voice and the caller passed the phone to her son, and she talked to her son. She asked him his whereabouts but was afraid to tell. PW7 then passed the phone to the caller who then allegedly told her, 'I will inform you when and where to pass the money to me'. At that juncture the phone line was cut off, and PW6 called her husband, Chong Bui Ling ('PW6').

[15] PW6 thereafter talked to the, in PW5's word, 'kidnapper'. PW6 testified using his handphone, he dialled his son's number because when his wife ('PW5') received the call from the caller, the handphone appearing on PW5's handphone belonged to his son, PW7. According to PW6, the

'kidnapper' told him, 'I have kidnapped your son and I demand RM200,000.' At PW6's request, the alleged kidnapper let PW6 talked to his son, PW7, who then confirmed he was kidnapped. After talking with his son, the kidnapper talked to PW6 and told him he demanded RM200,000. PW6 then asked whether the amount could be reduced and the kidnapper told him the matter had to be discussed and ended the conversation.

[16] PW6 testified that later around 8pm the kidnapper called him, informing him that 'they can reduce the ransom sum to RM180,000.' PW6 told the kidnapper he could not find such a huge sum of money and that he needed time to look for the money. The kidnapper then terminated the line, telling PW6 he would contact him again. According to PW6, at about 9pm the kidnapper called again asking how much money he could as at that time find. Upon PW6 telling the kidnapper, he could not find much money as it was night time, the kidnapper told PW6 to get half the ransom amount first. Then at around 9.30pm, PW6 received a call from PW7 informing him he had managed to escape from the kidnapper, and that at that time he was at Siniawan. PW7 used the phone of the house owner near the river bank. PW6 then called ASP Chan Shun Sing ('PW9') about the kidnapping matter and asked him what he (PW6) could do.

[17] PW9 told PW6 he would send some police personnel to his food court. On arrival there, the kidnapper called again demanding for the ransom. PW6 then told the kidnapper half the ransom money and that he was prepared to give the money to the kidnapper. In cross-examination PW6 testified, to the effect that while the kidnapper used his son's handphone when making the initial call to PW5, the telephone used by the kidnapper in making the rest of the phone calls thereafter did not belong to his son, PW7.

[18] In examination-in-chief, PW6 testified he agreed to give the ransom because by then his son had escaped, and that he (PW6) wanted to know the identity and location of the kidnapper, so that the police personnel could arrest them. According to PW6 when he went to fetch PW7 at Siniawan, PW7 told him one of the kidnappers was the person who rented one of the food stalls at the food court. He then identified that person to be the accused in court.

[19] PW6 testified that at around 10pm the kidnapper called telling him to pass the money to them at MJC. In cross-examination PW6 testified knowing his son had escaped, he mixed some RM100 and RM50 — notes with some papers to make the package that presumably he would bring to MJC look big. He drove to MJC and three police personnel followed from behind in a separate car. Upon arrival at MJC PW6 and the police personnel waited, and soon thereafter PW6 received a call from the kidnapper, telling him to drive towards the 3rd Mile area. According to him the kidnapper specifically told

him, that on his (PW6's) way to 3rd Mile from MJC, after the traffic light, he was to drive his car to the left side of a minor road, where he would see a telephone booth. PW6 testified, the kidnapper told him to 'just throw the money underneath the telephone booth'.

[20] PW6 did as instructed by the kidnapper, and after throwing the package beneath the phone booth, he drove his car to a nearby shop. According to PW6, thereafter he and the police personnel waited to see who would pick up the money. PW6 testified he parked his car infront of the shophouse, while the police personnel's car was parked at one of the minor roads. While waiting, PW6 received a call from the kidnapper, telling him he 'did not want to pick the money at the telephone booth because he informed me he saw one car and it looked (sic) a police car … The kidnapper told me to collect all the money and bring the money to the 3rd Mile roundabout'.

[21] Thereafter, according to PW6 the plan of giving the 'ransom' money was aborted as the kidnapper knew that the police personnel were around. After being told by PW6 that he (PW6) felt being played around by the kidnappers as the handing over of the ransom money could not yet materialise, he directed PW6 and the police personnel to go home. On the way back home and having retrieved the ransom money, the kidnapper called again, asking him to go to 3rd Mile area. PW6 then told the kidnapper that it would be better if they deal with the matter the following day. PW6 testified, the kidnapper then told him, 'Your family want to celebrate Chinese New Year or not? I can kill your son'. According to PW6, he then replied, 'We will discuss this matter tomorrow'. PW6 testified towards the end the kidnapper sounded very fierce and he initially felt very scared but calmed down, knowing his son had escaped.

[22] According to PW6 at the time of the incident, his phone number was 0198889793. Cross-examined, PW6 testified he did not know the voice of the kidnapper who made the calls to him. Based on PW6's CELCOM account statement exh P23(1–27) and the testimony of Norazlina bt Ahmad ('PW13'), on 7 February 2010 a call was made each at 17:58:05, 18:32:05 and 18:54:53 to the phone number 0138101171, and on the same day at 23:32:43 a call was made from PW6's handphone 0198889793 to 0198650873. It would be noted that based on exh P24(1–33), and PW13's evidence, at the material time, the number 0138101171 belonged to Chong Chun Min ('PW7'). Exhibit P24(1–33) ('p 11 of 26'), on 7 February 2010 at 14:51:18 and at 16:29:40 a call was made to respectively 0198889793 and 0138101171. According to PW13 and based on exh P22(1–6), the number 0198650873 which was registered on 7 February 2010 belonged to Chan How Kiat NRIC No 820306-10-5299. Anyway, that PW6 did on 7 February 2010 make some calls to PW7's phone number 0138101171, do appear to have been corroborated by exh P23(1–27).

RULING AT THE END OF PROSECUTION CASE

[23] Considered in the context of the charge preferred against the accused and two others still at large, the fundamental issue would appear to be, whether the accused and two others still at large, had in furtherance of a common intention wrongfully restrained a person with intent to hold ransom. At the end of the prosecution's case, after considering the evidence and both parties' submissions in the context of the ingredients of the offence as per charge and in the context of the applicable legal principles (see, for instance, s 180 of the Criminal Procedure Code and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 (FC)), this court found, that a prima facie case has been established.

THE DEFENCE VERSION LAID OUT

[24] Presumably on 7 February 2010, the accused met 'Ah Boy', 'Ah Fatt' and a person he referred to as 'Boon Jang Lung' at a coffee shop in MJC, Kuching. The accused testified Boon Jan Lung is his friend, and that he ('the accused') knew Ah Boy but he did not know Ah Fatt. The accused testified 'Boon Jang Lung' asked him to collect money from people. According to the accused, Ah Boy told him 'Boon Jang Lung' also asked him to collect money. Examined-in-chief, the accused testified Ah Boy did not say what money and from whom, but he did agree to collect the money.

[25] Examined how Ah Boy proposed to collect the money, the accused testified rather ambiguously: 'Ah Boy asked me to change my car with my friend's car because my car is not functioning well on that day and Ah Boy fetched me and Ah Boy's friend drove Ah Boy's car and we all left and go to Bau'. According to the accused, Ah Boy told them they were going to Bau 'because Boon Jang Lung asked Ah Boy to collect money for him.'

[26] The accused further testified, that at a place called Tondong Ah Boy disembarked from the car and bought something from a shop.

Subsequently, according to the accused he came to know Ah Boy bought a knife at the Tondong bazaar. Thereafter Ah Boy left, leaving the accused and another fellow, whom the accused did not know. Later on Ah Boy returned and asked the accused to drive the car to Bau. The accused did so 'because Ah Boy did not have a driving licence.' The accused drove to Tasik Biru, Bau.

[27] According to the accused, Ah Boy and Ah Fatt left Tasik Biru in a car, leaving behind the accused and Ah Boy's friend. Meanwhile, the accused and Ah Boy's friend had some drink in a coffee shop at Tasik Biru. About half an hour later Ah Boy and Ah Fatt returned to Tasik Biru.

[28] The accused testified, he then called Boon Jang Lung and asked him from whom should he (the accused) collect the money. Allegedly, Boon Jang Lung told him Ah Boy should know from whom the accused should collect the money. According to the accused he did ask Ah Boy about the matter where upon the latter told the accused to call Ah Min, the son of the owner of Ming Ming Food Court, Bau. The accused testified he knew Ah Min.

[29] Examined, the accused testified Ah Boy talked with Ah Min but he (the accused) did not hear the conversation, and neither did Ah Boy tell him what he and Ah Min were talking about. Ah Boy then asked the accused to call Ah Min. Examined further, the accused testified: 'After that I went back to the coffee shop as I refused to call Ah Min as I still owe him some money.'

[30] According to the accused, after that a police vehicle arrived at the coffee shop and Ah Boy drove his car to the opposite side of Tasik Biru. Ah Boy called his friend to drive his car to another road near Tasik Biru. The accused testified Ah Boy asked him to walk over to Tasik Biru. Ah Boy allegedly asked him why he did not want to call Ah Min. According to the accused, he told Ah Boy he (the accused) still owed Ah Min some rental money. Ah Boy then asked Ah Fatt to come over and he used Ah Fatt's handphone to call Ah Min.

[31] The accused testified he could hear Ah Boy informing Ah Min, that Ah Min's brother still owed him (Ah Boy) some money, and Ah Boy asked Ah Min to Tasik Biru. Examined as to the purpose of wanting Ah Min to come to Tasik Biru, the accused testified: '… because since I still owe Ah Min RM150 for rental so I can pay off this RM150 rental but Ah Min's brother still owe Ah Boy more than RM20,000.' As would later be reverted to, the matter about the RM20,000 appears to be an afterthought as it was not put to Ah Min or to any of the prosecution witnesses during cross-examination. Anyway, according to the accused, Ah Min did agree to go to Tasik Biru, arriving there at about 5.30–6.00pm in his mother's car and together with his female worker.

[32] According to the accused, at first Ah Min went to a coffee shop. Ah Min then called Ah Boy where upon the latter asked Ah Min to go to Tasik Biru. The accused testified at Tasik Biru Ah Min again called Ah Boy. At this juncture of the court trial, the accused told the court, 'After that Ah Boy passed the knife to me'. Thereafter Ah Min drove his car to where Ah Boy and the accused were standing. The accused testified, beside himself and Ah Boy, one Ah Fatt also known as Siong Siaw Fatt, was also there.

[33] Examined further on Ah Boy's alleged passing of the knife to the accused, the accused testified, '… Ah Boy did not tell me why did Ah Boy pass the knife to me. He only asked me to hold the knife.' According to the accused, upon arrival at Tasik Biru, 'Ah Min looked for me. I told Ah Min I wanted to

pay him the rental money.' The accused told the court he had not yet passed the rental money to Ah Min when Ah Boy approached Ah Min and passed to him a piece of paper with writing on it. According to the accused, as the piece of paper was being passed, Ah Fatt walked towards the car door and 'tried to prevent Ah Min's worker from coming down from the car.'

[34] The accused further testified that after passing the piece of paper to Ah Min, Ah Boy pulled Ah Min's shirt, asking him to get into the car. According to the accused at that time he was behind Ah Boy. Examined as to whether he (the accused) did anything presumably at that point in time, the accused replied rather evasively, 'After that Ah Min retaliate (sic) and Ah Boy took out the knife.' The accused testified Ah Boy got the knife from his (Ah Boy's) bag. The accused told the court Ah Min retaliated by trying to push Ah Boy, and after that 'Ah Boy took out the knife but Ah Min was trying to escape so I get hold of Ah Min to prevent him from escaping.'

[35] Examined whether Ah Boy tried to stab Ah Min with the knife, the accused gave a rather peculiar answer: 'No, because when Ah Min saw the knife, he wanted to escape'. According to the accused at that juncture he got hold of Ah Min 'to prevent him from escaping.' He testified he did so by extending both his hands sideways (as demonstrated by the interpreter and agreed to by the accused). Examined why he wanted to stop Ah Min from escaping, he replied, 'I followed Ah Boy's instruction.'

[36] According to the accused, while at that juncture there was no altercation, shouting or shoving between Ah Min and Ah Boy, they did talk to each other but not loudly. The accused told the court, having been told to do so by Ah Boy, Ah Min did get into the car and was seated at the back seat.

[37] Examined, as to what he, Ah Fatt and Ah Boy did after Ah Min got into the back seat of the car, the accused replied: 'Before Ah Min entered the car, Ah Boy asked me to pass the knife to Ah Fatt. After Ah Min had entered the car and seated at the back of the car, then Ah Boy drove the car. Ah Fatt and I also entered the car.' It would be noted that this version of Ah Boy asking the accused to pass the knife to Ah Fatt was not put to either PW7 or PW8 during cross-examination. In any case, it seems unclear which knife is being referred to — whether or not it was the one earlier on allegedly given to the accused by Ah Boy. The accused further testified Ah Min was seated between him and Ah Fatt, while Ah Min's worker was seated on the front passenger seat. According to the accused, after that, Ah Boy signalled his friend to follow them from behind, and the friend did so.

[38] While inside the car, Ah Fatt took off his long sleeve t-shirt and used it to cover Ah Min's head. Ah Fatt also took away Ah Min's handphone.

The accused further testified, half way through the journey Ah Boy asked him to be the driver 'as he is not good at driving.' It was, at that time, that Ah Boy tied up Ah Min at the back seat of the car.

[39] According to the accused, meanwhile Ah Fatt called someone and that someone told him where to go. Ah Fatt told the accused to drive to 'a place where we used to go fishing for prawns … at Sg. Pinang.' The accused testified that as he was heading for 'the place where we fished for prawn,' Ah Boy asked him to go to an empty house at Sg. Pinang.'

[40] Upon arrival at the empty house, Ah Boy asked Ah Min to get out from the car. Based on the accused's testimony, it would appear that, at that juncture, Ah Boy, Ah Fatt and Ah Min went into the empty house, while the accused remained in the car to guard Ah Min's worker. The accused's evidence seems to suggest that subsequently, Ah Fatt brought Ah Min's worker into the empty house, and that Ah Fatt told him to look around to see whether anyone was coming. According to the accused, subsequently Ah Boy asked him to into the empty house, and Ah Boy told Ah Fatt to go outside the house to look for rope. He testified that they reached the empty house at around 6.30pm and it was quite dark and was raining.

[41] The accused further testified that the rope was used for tying up Ah Min. According to the accused, Ah Boy went out of the empty house and 'cut the safety belt and … used the safety belt to tie up Ah Min.' Ah Boy also tied Ah Min's worker with safety belt. The accused told the court Ah Fatt used a piece of cloth 'to tie up' the eyes of both Ah Min and Ah Min's worker. The accused testified he did not participate in the tying up of Ah Min and Ah Min's worker.

[42] It is the accused's testimony that after Ah Boy found a nylon string from inside the car belonging to Ah Min's mother (the one used by Ah Min to go to Tasik Biru), Ah Min and his worker were 'tied back to back'. The accused testified the tying back to back of Ah Min and his worker was done by Ah Boy and Ah Fatt. At that juncture the accused did not know what time it was, but he agreed it was 'very dark'.

[43] The accused testified it was while still in the car, that Ah Min's thumbs were tied together with something that looked like a 'zip', and that both toes of Ah Min were tied at the empty house. The accused however did not know who tied Ah Min's thumbs and toes. The accused told the court the thumbs of Ah Min's worker were tied up, but he was unsure whether her toes were tied as well.

[44] According to the accused, while in the empty house, Ah Fatt did contact someone but he did not know who. He testified Ah Boy did call Ah Min's

mother, but did not hear him calling Ah Min's father. Examined whether he himself called anybody, the accused replied, 'I did not have a handphone'.

[45] Presumably at some juncture of the incident, while the accused was 'standing at the road where Ah Min's mother's car was parked', Ah Boy's friend, 'the one driving Ah Boy's car' came to the empty house and asked the accused where was Ah Boy. Ah Boy was then went inside the empty house and Ah Boy's friend went inside. The accused testified Ah Boy and his friend talked to each other, but he did not know what they were talking about. According to the accused, Ah Boy's friend then drove away.

[46] The accused further testified, that thereafter while he was outside as instructed by Ah Boy 'to look around to see whether anybody was coming', Ah Boy was calling somebody. According to the accused, while he was outside no one else came to the empty house, and, at the instruction of Ah Boy, the three of them — Ah Boy, Ah Fatt and the accused himself, left the empty house after about half an hour since arrival. They left using Ah Min's mother's car.

[47] Examined as to the incident of Ah Boy talking to somebody, the accused testified that while inside the empty house, Ah Boy asked for the telephone number of Ah Min's mother. Ah Min gave him the telephone number, and according to the accused Ah Boy called Ah Min's mother, but he did not hear the conversation. The accused further testified Ah Boy made a total of two to three phone calls, but except for the call to Ah Min's mother, concerning the other calls he did not know who Ah Boy called.

[48] The accused would later in his examination-in-chief testify, that while Ah Boy was talking to Ah Min's mother, he heard Ah Boy mentioning ransom money, but he did not hear him mentioning any amount. He however testified Ah Boy did say Ah Min's mother agreed to give the money. Examined further when and where did he first heard Ah Boy mentioning the words 'ransom money', the accused's respective replies were, 'inside the car' and 'at MJC'.

[49] The accused's counsel than appears to have repeated his earlier question as to whether the accused heard Ah Boy mentioning the words 'ransom money' when Ah Boy talked with Ah Min's mother over the phone. This time the accused replied, 'I did not hear'. An over-all consideration of the accused's testimony on this portion of the defence version, therefore would indicate, that the first time the accused heard Ah Boy mentioning the words 'ransom money' was when they were inside the car at MJC, and presumably not at the empty house when Ah Boy was talking with Ah Min's mother over the phone.

[50] According to the accused, Ah Min and his worker were left behind inside the empty house. Examined as to why, the accused replied: 'Because Ah

Boy only asked me and Ah Fatt to follow him.' According to the accused, neither Ah Boy nor Ah Fatt inform him why Ah Min and his worker were not brought along. He testified while inside the empty house, Ah Min and his worker were not guarded. Examined why so, the accused told the court, 'Because at that time both of them were tied up'.

[51] Having left the empty house and coming out of a junction, Ah Boy called his friend. According to the accused, Ah Boy's friend told him he would be waiting at a place where a black Kenari car is parked at the roadside. Upon reaching the place, Ah Boy gave the accused his waist bag (pouch) and told him to go into another car. According to the accused when the came out of the junction, they came across three cars — a Kenari, one Proton car and Ah Min's mother's car, and that he was asked to go into the Proton car belonging to Ah Boy's friend. The accused testified nobody was driving the Proton car.

[52] Meanwhile, Ah Boy and Ah Fatt did not enter any car, and were 'looking for things in Ah Min's mother's car.' Ah Boy asked the accused to start the Proton car. The accused further testified that while Ah Fatt was standing beside Ah Min's mother's car, Ah Boy then walked towards his friend's car the Kenari and 'took out 2 bottles of benzene oil'.

[53] Examined what happened thereafter, the accused testified: 'Ah Boy used up the tissue box and threw the tissue box into Ah Min's mother's car … At first nothing happened to the car but when Ah Fatt tried to open the door of the car, the car was burnt and Ah Fatt was injured as a result of the car being burnt.' Examined whether he, Ah Fatt and Ah Boy stayed on and watched the car burning, the accused answered: 'Yes, we stayed on. After that Ah Boy and Ah Fatt entered the Proton car and Ah Boy asked me to drive the Proton car.'

[54] According to the accused, Ah Boy told him to follow the Kenari car which was heading to MJC, the distance of about a 25 minutes — drive from where Ah Min's mother's car was burnt. Upon reaching MJC the accused asked the driver of the Kenari where was his (the accused's) car and was told it was at MJC. The accused testified he did not see his car there, 'so the driver of the Kenari asked me to drive the Proton back to Sg. Pinang to take my car.'

[55] According to the accused he collected his car at the junction before reaching the empty house at Sg Pinang. After that he went to MJC and looked for Ah Boy. The accused testified, after finding him, he asked him: '… since you asked me to collect money from Ah Min, why do you want to get hold of Ah Min?' Examined as to what was the reply, the accused answered, 'Ah Boy said you don't care what I am doing. You just follow my instruction.'

[56] As earlier indicated, near the end of his examination-in-chief, the

accused would testify that he first heard Ah Boy mentioning the words 'ransom money' was while they were inside the car at MJC. Examined as to what was his reaction when Ah Boy mentioned the words 'ransom money' at MJC, the accused replied, 'I don't want to go and collect the ransom money'. Asked, why, he answered, 'Because this is considered kidnapping'.

[57] Thereafter Ah Boy asked the accused to leave his car at MJC and told the accused to follow him in his car. After about an hour's wait, Ah Boy came and the three of them, presumably Ah Boy, Ah Fatt and the accused went to have dinner at 'Singapore Chicken'. The accused would later testify that only Ah Boy and Ah Fatt had their dinner there.

[58] Examined whether the three of them discussed anything while having dinner, the accused replied: 'I asked Ah Boy why you have to get hold of Ah Min. You can straight away go and approached Ah Min's mother since Ah Min's younger brother owe some money to Ah Boy.' According to the accused, Ah Boy's reply was that he 'will do the necessary arrangement'. Examined whether Ah Boy elaborated on what was the necessary arrangement, the accused replied, 'No'.

[59] The accused testified that thereafter the three of them drove around MJC, Ah Boy being the driver. The accused told the court, while at MJC Ah Boy made phone calls. He however did not know who Ah Boy called. The three of them then went to Ah Boy's friend's house at MJC area. While there, Ah Boy asked the accused and Ah Fatt to wait inside Ah Boy's car while Ah Boy went into his friend's house. After waiting presumably for 20 minutes, Ah Boy returned to the car and asked Ah Fatt to drive to MJC. The accused told the court, '… at MJC we changed cars and we used Ah Fatt's car'. The reason for changing cars according to the accused was, 'because Ah Boy's car run out of petrol'.

[60] The accused testified they then drove around several times at MJC area, 'because Ah Boy said he is looking for somebody'. Ah Boy did not say who he was looking for. According to the accused, the three of them then went to 3rd Mile area as Ah Boy wanted to look for his friend. Thereafter, they returned to MJC area. According to the accused, he then told Ah Boy he wanted to go back as he had to go to work the next day. Ah Boy told him he could not do so, allegedly telling the accused 'the police wanted to arrest me'. According to the accused he then felt very scared.

[61] The accused testified that thereafter he called his brother, 'Because my car which was left at MJC area as my brother also have to use the same car …

to use to go to work'. According to the accused, after that Ah Boy drove the accused to MJC area and then to 3rd Mile area and then back to MJC area again.'

[62] Examined as to the incident of going back and forth between MJC and 3rd Mile area, the accused replied, 'Ah Boy said his friend is coming out from his house to see him'. The accused told the court, Ah Boy did meet his friend at a shop known as 'Lau Han Chia'. At that time he and Ah Fatt were waiting inside Ah Fatt's car. He did see Ah Boy's friend at the Lau Han Chia shop, but did not get to meet him, and neither did he know what Ah Boy discussed with his friend.

[63] Examined as to what the three of them did after that, the accused replied, 'After that Ah Boy entered the car and he told us he is going to collect money from someone. Examined further, the accused replied 'No' to each of the questions: Did he say what money? Did he say from whom? Did Ah Boy proceed to collect the money?

[64] According to the accused, after that Ah Boy asked him and Ah Fatt to go and collect the money. The accused testified Ah Boy did not say from whom, neither did he say how much. The accused further testified, Ah Boy also did not say when were they supposed to collect the money. Examined as to what did the three of them do after the aforementioned conversation, the accused testified: 'After that Ah Boy asked me and Ah Fatt to collect the money again. This time the place is near to a bus stop. At first, myself and Ah Fatt don't want to go and collect the money because Ah Fatt suspected this is ransom money. So finally Ah Fatt and myself did not go and collect the money'.

[65] Examined what happened after that, the accused told the court Ah Fatt drove around 3rd Mile area and Hui Sing area. According to the accused, Ah Fatt wanted to go to a petrol station to fill up his car, but as he did not have any money and he borrowed some money from him. The accused testified they moved around almost until 1am and after that they went to Ah Fatt's house at 7th Mile.

[66] The accused told the court, at Ah Fatt's house, Ah Fatt and himself asked Ah Boy 'why do you have to collect this money and why do you have to get hold of Ah Min?' According to the accused, Ah Boy's reply was, '… you don't have to care what I am doing because I can arrange everything because I said I knew Ah Min'. After that Ah Boy asked the accused to stay at Ah Fatt's house until the next morning. According to the accused after that Ah Boy drove Ah Fatt's leaving himself and Ah Fatt behind. Subsequently, Ah Boy returned and also stayed at Ah Fatt's house. The accused testified he stayed at Ah Fatt's house until the next morning.

[67] The next morning Ah Boy told the accused the police was looking for him, and the accused asked him, 'In that case what should I do'? The accused testified: 'Ah Boy drove me around 7th Mile bazaar and asked me to come down from the car and asked me to go to kampung. Ah Boy told me if I was arrested by the police don't mention his name at all to the police. Ah Boy have a pistol in his bag and he told me if I mentioned his name to the police he will come and disturb my family.'

[68] According to the accused he called his brother and asked him to send him to the kampong at Serian. The accused further testified he stayed there for one day and one night. While at the kampong the accused's younger sister, Chong Jun Yuan, called him and asked him, '… why I do such a thing'. According to the accused he replied, '… I do not know that such a kidnapping incident will happen.' The accused testified his younger sister advised him to surrender to the police, and that if he were to surrender she will make arrangement for the police to fetch him. According to the accused, he eventually surrendered.

[69] At the end of his examination-in-chief he denied '(having) any idea that Ah Boy wanted to kidnap Ah Min for ransom', saying, 'I do not know. He only told me he wanted to collect money.' He testified that he knows all of Ah Min's family members, and that Ah Min's worker knows him. Asked by his counsel, 'Had you known that Ah Boy had an ulterior motive i e kidnapping, would you had (sic) agreed to go to see Ah Min at Tasik Biru?', the accused replied: 'No, I wouldn't follow him to Tasik Biru'.

MAIN FEATURES OF THE DEFENCE VERSION

[70] It would be noted, that the manner the accused's testimony was elicited during examination-in-chief made the task of chronologically summarising the defence version very difficult. Hence the rather lengthy portrayal thereof. Basically the defence of the accused would appear to be, that from the initial Tasik Biru incident all the way up to the point when Ah Boy allegedly mentioned the words 'ransom money' while they were inside the car at MJC, the accused was wholly unaware of '(Ah Boy's wanting) to kidnap Ah Min for ransom'. At the defence stage, it would therefore appear imperative that this line of defence be tested against all the evidence adduced by the prosecution, including a consideration of whether all vital aspects of the aforesaid line of defence and matters related thereto, had been put to the appropriate prosecution witnesses or, in any case, properly raised during cross-examination of relevant prosecution witnesses.

[71] It also seems implicit in the defence version that one Boon Jang Lung was the initiator behind the whole incident alleged by the prosecution to be

kidnapping. The accused testified at the initial stage he refused to call PW7 as he knew him and still owed him RM150 rental of a food stall belonging to PW7's father. The accused went on to testify to the effect that Ah Boy ended up initially calling PW7 whereby presumably during the conversation Ah Boy mentioned 'inter alia' that PW7's younger brother still owed Ah Boy RM20,000. This matter of PW7's younger brother still RM20,000, however appears to be an afterthought as it was not put to any of the prosecution witnesses particularly PW7, PW6 and PW5 during cross-examination.

[72] The accused's line of defence seems to be that he was completely ignorant of the kidnapping scheme, thinking the whole incident was merely debt-collecting at the instruction of one 'Boon Jang Lung'. Closely scrutinised, however, nothing substantial could be gleaned from the defence evidence including and particularly the accused's testimony that supports such a line of defence, and/or which could raise any reasonable doubt in the prosecution's case as substantially portrayed by the testimonies of the main prosecution witnesses, PW7 and PW8. In fact, the accused's testimony clearly indicates the actual occurrence of some vital aspects of the prosecution's case as elicited through PW7 and PW8: PW7's attempt to resist Ah Boy when the latter took out a knife, and the accused's helping to thwart PW7's resistance and 'to prevent him from escaping', albeit allegedly at the instruction of Ah Boy. And as earlier pointed out, the line of defence associated with alleged debt-collection, would appear to be an afterthought, and therefore could not be considered.

[73] The following portion of the accused's testimony where he and Ah Fatt purportedly queried Ah Boy appears to indicate substantially the accused's line of defence: '… since you asked me to collect money from Ah Min, why do you want to get hold of Ah Min?' Examined as to what was the reply, the accused answered, 'Ah Boy said you don't care what I am doing. You just follow my instruction'. This allegedly occurred after the accused, Ah Fatt and Ah Boy had left PW7 and PW8 tied up at the empty house and they were already at MJC. The implication here seems to be that the accused had nothing to do with and neither was he, at all, in the know of why allegedly Ah Boy had to get hold of PW7.

[74] Having in the first place helped in convincing PW7 to come to Tasik Biru — based on the substantially unchallenged testimony of PW7 — and thereafter having helped Ah Boy in, not only preventing PW7 from escaping but also in tying him up, the accused's aforesaid line of defence appears to be, not only a desperate 11th hour concoction but also seriously inconsistent, if not completely contradictory to his actions from the time of calling PW7 to come to Tasik Biru to the time PW7 and PW8 were tied up and abandoned at the empty house.

A SUBMISSION OF THE PROSECUTION

[75] Basically the submission of the learned deputy public prosecutor ('DPP') is that the direct eye-witness evidence of the prosecution 'is just overwhelming … like a tidal wave that swept the walls of the defence, which B stood like men of straw.' Having given some elaboration on the law pertaining to common intention and burden of proof, she then makes what seems to be a general conclusion, that the defence has failed to raise reasonable doubt in the prosecution case, and that the prosecution has proven its case beyond any doubt.

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[76] Notwithstanding that the learned DPP did not condescend upon a closer scrutiny of more evidential details adduced by both the prosecution and the defence -particularly the accused's testimony vis a vis the testimonies of the D prosecution witnesses, except on one or two points including the accused's testimony of himself trying to prevent PW6 from running away, it would, nevertheless, appear tenable her contention to the effect that the defence version is too sketchy, and that it has failed to cast any reasonable doubt upon the prosecution case.

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[77] The learned DPP also submits: All the evidence adduced by DW3 (the accused) corroborates the evidence adduced by the prosecution's witness (sic) which clearly shows that the prosecution witnesses are telling the truth. The evidence as testified by DW3 clearly shows the kidnapping really occurred and F the accused together with the other two who is still at large had with common intention committed the crime.' With respect, a closer scrutiny of the accused's testimony as earlier laid out in considerable detail does appear substantially supportive of the aforesaid contention of the prosecution.

G SUBMISSION OF THE DEFENCE

[78] The unsigned defence submission was e-mailed practically at the 11th hour beyond the allocated period of time. Anyway, despite of its 23 pages, with respect, no substance could be gleaned from it. Basically it talks of the charge H being defective. The reason which seems implicit appears to be that, based on the testimonies of PW7 and PW8, instead of just PW7, both of them ought to have been included as victims of the kidnapping charge. The submission also seems to suggest that the charge ought to have mentioned not two, but only one person at large, since 'The evidence adduced showed that one other person I was arrested together with the accused but he was subsequently released on (sic) the direction of the DPP.'

CONCLUSION

[79] To begin with, the purported defect issue appears to be of the type which ought to have been raised at the commencement of the trial or very soon thereafter. In any case, it does not appear to have been precisely shown the nature of the alleged defect and the nature and extent of how the alleged defect has occasioned a failure of justice as contemplated by s 422 of the Criminal Procedure Code. With respect, the manner in which this case was dealt with necessitates the need to emphasise the vital importance of bona fide exercise of due diligence and efficiency in the conduct of a case, particularly so in a very serious criminal case which could potentially attract the death penalty. Anyway, considering the public prosecutor's wide discretion in issues of 'inter alia' whether or not to prefer a charge against a potential defendant and if a charge is preferred, the nature thereof, presumably having regards of the quality and quantity of the relevant available evidence, the aforesaid contention would appear thoroughly meritless. The issue relating to curability or otherwise of the alleged defect therefore does not arise.

[80] It would appear to be also the defence submission that 'the prosecution has also failed to prove common intention pursuant to s 34 of the Penal Code'. With respect, having regards to the evidence both direct and circumstantial adduced by both the prosecution and the defence, and having regards to the relevant legal principles, including and particularly the Supreme Court case of *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336, cited by both learned counsel for the defence and the learned DPP, this contention is also meritless. It is to be noted that the above exposition of the defence version shows that a substantial portion thereof actually supports the prosecution version, notwithstanding the attempt to implicitly attribute the intention to kidnap on 'Boon Jang Lung' and 'Ah Boy' and the accused's denial of knowing such intention to kidnap.

[81] For all the reasons adumbrated above, this court found the defence failed to cast any reasonable doubt upon the prosecution case and hence the finding of guilt and conviction of the accused.

Concerning the sentence imposed, this court considered the seriousness of the offence and the public interest. After taking into account the submission in mitigation, of paramount consideration must necessarily be the public interest. The public interest would only be served if others who might be contempating

A to commit similar offence would refrain from actually doing so. Hence the imposition of the six strokes of whipping in addition to the sentence of life imprisonment.

Accused convicted and sentenced with the offence charged.

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Reported by Kohila Nesan

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